



# The Attorney General of Texas

July 26, 1983

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Mr. Bill Stewart  
Executive Director  
Texas Air Control Board  
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Open Records Decision No. 391

Re: Whether common law confidentiality privileges incorporated into section 3(a)(1) of the Open Records Act are applicable to records of the Texas Air Control Board subject to sections 2.13 and 2.14 of the Texas Clean Air Act, article 4477-5, V.T.C.S.

Dear Mr. Stewart:

You have requested our opinion regarding the confidentiality of certain records held by the Air Control Board. Article 4477-5, V.T.C.S., the Texas Clean Air Act, provides, in pertinent part:

Sec. 1.07. Information submitted to the board relating to secret processes or methods of manufacture or production which is identified as confidential when submitted shall not be disclosed. . . .

Sec. 2.13. All information, documents and data collected by the board. . . are property of the state. Subject to the limitations of Section 1.07. . . all records of the board are public records open to inspection by any person during regular office hours.

Sec. 2.14. Subject to the limitations of Section 1.07. . . the board shall furnish certified or other copies of any proceeding or other official act of record, or of any map, paper, or document filed with the board. . . .

In Attorney General Opinion H-276 (1974), this office construed this statute to require disclosure of the names of persons complaining of emission of air pollutants from a particular source, and their verbatim statements, "to the extent that they appear in the records of the Air Control Board." In our opinion, this conclusion was based upon an erroneous construction of the term "records" in section 2.13.

The Open Records Act, article 6252-17a, V.T.C.S., enacted in 1973, contains a broad definition of "public records":

the portion of all documents, writings, letters, memoranda, or other written, printed, typed, copied, or developed materials which contains public information.

"Public information" is in turn defined to include:

[a]ll information collected, assembled, or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business.

This definition is as limited by 18 specific exceptions. "Records" is not defined in the Clean Air Act, and Attorney General Opinion H-276 apparently borrowed the Open Records Act's broad definition of "public records" and applied it to the "records" which are the subject of section 2.13 of the Clean Air Act. The Clean Air Act, however, was enacted in 1967, at a time when "public records" had a more restrictive meaning. See, e.g., State ex rel. Kavanaugh v. Henderson, 169 S.W.2d 389, 392 (Mo. 1943) (document is a "public record" if it is required to be filed in a public office); Douvas v. Newcomb, 267 P.2d 600, 604 (Okla. 1954) ("public record" is one required to be kept and filed in such manner that it is open to public inspection); Sorley v. Lister, 218 N.Y.S.2d 215, 219 (N.Y. Sup. Ct. 1961) (appraisals of property are not "public records"); State v. Sheppard, 128 N.E.2d 471, 498-99 (Ohio Ct. App. 1955) (work sheets of technician in coroner's office are not "public records"). In our view, Attorney General Opinion H-276 did not give proper consideration to the common law meaning of the word "records" as it existed at the time the Clean Air Act became law.

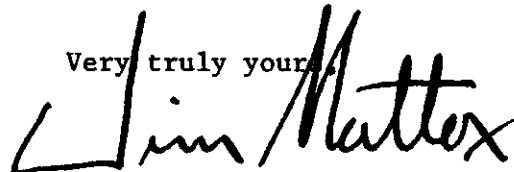
Furthermore, it is an established rule of construction that a statute should be construed as a whole, and effect given to every part. Henderson v. United States Fidelity and Guaranty Company, 10 S.W.2d 534, 536 (Tex. Comm'n. App. 1928). Although section 2.13 of article 4477-5 indicates that "all records of the board" are "open to inspection," section 2.14 requires the board to furnish copies only of "any proceeding or other official act of record, or of any map, paper, or document filed with the board." Thus, Attorney General Opinion H-276 construed section 2.13 to open for inspection a large category of records which section 2.14 does not permit to be copied. In our opinion, the legislature did not intend such an anomalous result. Accordingly, we believe that the meaning of "records" in section 2.13 is properly circumscribed by the records listed in section 2.14, and, as such, includes only "any proceeding or other official act of record [and] . . . any map, paper, or document filed with the board." To the extent that Attorney General Opinion H-276 concludes otherwise, we

believe it is incorrect, and it is hereby overruled to the extent of conflict.

Thus, we conclude that article 4477-5 makes available for inspection or copying only those records specifically made public in section 2.14 of that statute. The Open Records Act may require the disclosure of other information held by the Air Control Board, limited only by the 18 exceptions of section 3(a), article 6252-17a. One of those excepts from disclosure "information made confidential by law, either constitutional, statutory, or by judicial decision." Pursuant to this provision, we have recognized that common law confidentiality privileges, such as the informer's privilege, and the attorney-client privilege, are incorporated into the Open Records Act. See Open Records Decision Nos. 320, 308, 304 (1982); 210 (1978); 172 (1977).

In Open Records Decision No. 296 (1981), this office said that information which identifies persons who make complaints to a city regarding lead pollution may be withheld from disclosure under section 3(a)(1) of the Open Records Act. Such information is made confidential by the informer's privilege. In our opinion, this decision is equally applicable to such information when furnished to the Air Control Board. Accordingly, it is our decision that information which identifies or tends to identify persons who make complaints to the Air Control Board regarding pollution is excepted from disclosure under section 3(a)(1) of the Open Records Act, as information made confidential by judicial decision, i.e., the informer's privilege.

Very truly yours,



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